CHARLES A. WEBB, Complainant v. CAROLINA POWER & LIGHT COMPANY, Respondent	DATE ISSUED: July 24, 1996 CASE NO.: 93-ERA-42

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Before: Nicodemo De Gregorio
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint that Charles A. Webb (Webb) filed on April 7, 1993 against Carolina Power & Light Company (CP&L) under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851. By Recommended Decision and Order dated February 10, 1994, I recommended that CP&L's Motion for Summary Decision be granted and the complaint dismissed. By Decision and Remand Order of July 17, 1995, the Secretary of Labor rejected the recommendation and remanded the matter for a hearing on the merits. The hearing was conducted on March 6, 7 and 8, and April 16, 1996. Both parties have filed briefs, and CP&L has also filed a reply brief. All briefs have been duly considered, and have been very helpful for the delineation of the many issues to be resolved.

BACKGROUND

I

CP&L is a licensed operator of three nuclear power plants, one of which is the Brunswick Steam Electric Plant (Brunswick Plant) in Southport, North Carolina. At all times relevant to this case, CP&L had contractual arrangements with several firms to provide technical personnel for hire as temporary contract workers.

Webb completed the high school, and took one division of civil engineering through international correspondence schools, which taught him the elements of mathematics, machine mechanics, and civil engineering. Tr. at 69-70. Webb believes that this course is the equivalent of a two-year college degree. Ibid. He has worked as a contract engineer in the nuclear industry for more than 20 years.

Webb was first employed by CP&L in April 1985 at the Shearon Harris Nuclear Power Plant, New Hill, North Carolina, where he worked as Pipe Support Engineer until August 1986. CX 14. Webb obtained this work through his wife who was working at the facility and circulated his resume to hiring supervisors. Tr. at 75. In November 1986, Webb obtained a similar position at the Brunswick Plant, by contacting his former supervisor Mr. Chuck Kestner who passed out Webb's resumes to the supervisors at the facility. Tr. 83; CX 14. This employment lasted until March 1988. Webb was re-employed by CP&L from October 1988 to August 1989 as Civil/Structural Engineer, and from August 1989 to November 1991, as a Senior Engineering Specialist. CX 14.

When Webb left CP&L in November 1991 he had expectations of returning to work for CP&L, based on the fact that he had done so for every outage since 1985. Tr. at 101. However, these expectations were never realized. Despite persistent efforts, Webb has been ever since unable to find employment as a civil/structural engineer anywhere in the nuclear industry, or any other industry. Tr. at 204-206; 301-307. As of march 6, 1996, Webb had just completed a course in Computer Assisted Design, which he took in order to improve his work skills. Tr. at 206, 306.

II

In 1989, the Nuclear Regulatory Commission (NRC) conducted an inspection of the Brunswick Plant and issued a Diagnostic Evaluation Team Report critical of the condition of the plant and the quality of the engineering organization. The report disapproved of the large backlog of maintenance work that remained undone, and of the low percentage of engineers with a four-year degree. Tr. at 346-49. In March 1992, the NRC conducted a follow-up inspection of the Brunswick Plant in order to determine whether satisfactory progress had been made in correcting deficiencies. Tr. 359. The inspection team raised issues concerning the accumulation of a large number of structural modifications which had been recommended but had not been fixed, missing bolts from support structures, and concerning the methodology used by CP&L in inspecting the bolts in the walls

of the diesel generator building. In response to these concerns, CP&L undertook an inspection of its own, looking for missing hardware, cracks in concrete, and other defects affecting the structural integrity of the plant. When CP&L discovered that some bolts in the diesel generator building had been fraudulently installed at the time of its construction, CP&L decided to shut down, on April 21, 1992, both nuclear reactors in the plant. Tr. at 371-72, 377.

III

Newspaper accounts of the shutdown implied that CP&L had just discovered the "fake" bolts. Webb felt "betrayed" by CP&L management, because he knew that the problem had been reported by 1987, so that for five years management had operated the plant in a condition which he thought was unsafe. Tr. at 101-102. Webb first complained to the newspaper about the inaccuracy of its report. On April 23, 1992, Webb called the NRC's resident inspector at the Brunswick Plant, David J. Nelson, to report the fact that management had known about the fake bolts since 1987. Tr. 103. Webb then called NRC's Regional Director in Atlanta, Georgia, who suggested a conference call later on with Mr. Carlo Julien. At the conference, held on May 5, 1992, Webb talked about structural integrity problems at the Brunswick Plant. Tr. at 106. Webb requested and was assured that his name would be kept confidential. Tr. at 109. Webb did not tell anyone about his NRC contacts, except his wife.

At the conference call, Webb agreed to meet with Mr. Nelson, the Resident Inspector, and Mr. Joe Lenahan from the NRC's Atlanta Regional Office. The meeting took place on May 13, 1992 in a hotel room in Southport, North Carolina. The purpose of the meeting was to copy computer discs provided by Webb onto NRC computer system so the NRC personnel could review Webb's allegations. CX 61A. Webb carried a gun to the meeting, out of concern for his safety. Nelson, in turn, became concerned about his own safety, and completed the interview as quickly as possible. CX 61 at 39-40; CX 61A. Nelson shared this experience, which became known as the "armed alleger incident", with NRC personnel, so that other inspectors might be prepared for a similar eventuality when meeting allegers off-site. CX 61 at 37-38. Nelson testified that he does not recall mentioning the name of Webb in his discussions of the incident with NRC people, and that it would have been unusual for him to do so, in view of their practice of keeping an alleger's identity secret. CX 61 at 40. Nelson also testified that sometime in 1993 two or three employees of CP&L, in the course of casual conversations, asked

him about the armed incident, but he did not disclosed the identity of the alleger. CX 61 at 33-37; CX 61A.

Webb made 11 allegations to the NRC. CX 40A. Of these, only four were brought to the attention of CP&L as "received" by NRC. By letter dated May 5, 1992, NRC transmitted to CP&L an allegation concerning an undersized steel beam located in the North RHR (Residual Heat Removal) room in the reactor building. RX 28. Webb testified that he had discovered the defect when he and another employee, Perry Mitchell, were assigned to check the beam, and that his name, as well as Mitchell's, is on the analysis package. Tr. at 117. Apparently, this work was done in 1987, when Webb first worked at the Brunswick Plant. CX 28, at 2; CX 41 at 5.

On May 7, 1992, NRC transmitted to CP&L four additional allegations. One was an elaboration of the previous allegation about the undersized beam; the other three relate to a missing bolt in the control room ceiling, missing bolts from conduit supports in the reactor building, and the presence of certain supports for conduits which appeared not to have been analyzed. CX 41. Webb testified that he had personally reported the missing bolt deficiencies to his supervisor, Richard Tripp, while his connection with the analysis issue was less specific. Tr. at 119-24.

CP&L'S PROCEDURE FOR HIRING CONTRACT WORKERS

During 1992, CP&L had contractual arrangements with several firms for the recruitment of temporary contract workers. Action Tech, Energy Services Group, Quantum Resources, ESSI, and Intercon were among the major suppliers. Tr. at 687, 967. CP&L dealt with these "vendors" through two separate contract administration organizations, the Nuclear Engineering Department (NED) and the Brunswick Plant organization. NED was based in CP&L's corporate headquarters in Raleigh, North Carolina, although its employees and contract workers could be assigned to any one of CP&L's three nuclear power facilities. The Brunswick Plant organization was responsible for the operation of the Plant. During 1992, John Duncan was NED's Project Engineer responsible for hiring workers, with the assistance of Ray Heatherington. Tr. at 733-34. Janet Crews was the Director of Contracts at the Brunswick Plant organization, and performed a similar function. Tr. at 964-65.

The recruitment process at NED was as follows. When a manager determined that additional staff was needed, he advised

Heatherington of his needs. Heatherington in turn requested vendors to submit resumes of workers who met the requirements of the position. Tr. at 686-87. Ordinarily, the request was made by telephone call followed by a fax transmission. Vendors usually referenced the position or requirement for which resumes were submitted. Tr. 688-89. Heatherington then transmitted the resumes to the hiring manager who had requested workers. If the manager made a decision to hire an applicant, Heatherington wrote a letter to the vendor authorizing the employment of that individual. Tr. at 705. Heatherington testified that occasionally he received from a vendor a "blind resume", i.e., the offer of a worker, not in response to a particular request, but for any appropriate position that might be available. His normal practice was to discard such a resume unless the individual had a particular talent that might be needed in the short term, in which case he might keep it for one or two weeks. Tr. at 690-91, 702-703.

Duncan testified that in May 1992 he rarely received an unsolicited resume because the vendors knew he did not want them. He admitted that if an unsolicited resume indicated a very promising candidate and matched typical requirements the office was filling at the time, he might possibly circulate it to supervisors. Tr. 734-35. Neither Heatherington nor Duncan knew Webb before the institution of this suit. Tr. at 724, 750.

Janet Crews followed a similar procedure in recruiting contract workers for the Brunswick Plant, but she had a stricter policy against blind submittals. Ordinarily, a request from her office to vendors carried a BNP (Brunswick Nuclear Plant) identification number, and the responses were expected to bear the same identification number, so that Crews would know where to forward the resumes. Tr. 967-68. She did not accept blind submittals, and if any such submittal was received, she called the vendor to identify the position for which the resume had been submitted and then wrote the identification number on the submittal. Tr. at 987-88; CX 72 at 29-30, 55. Crews did not know Webb before the commencement of this proceeding. Tr. at 965.

The submittal process at Quantum Resources (Quantum)was as follows. CP&L notified Quantum, by fax or telephone, that it had a job order, giving a brief description of the job requirements. Quantum personnel punched in key information in their computer system and obtained a list of qualified candidates. The personnel then contacted the candidates to determine their availability for the job and negotiate pay rates. The resumes of individuals

interested in the job were then faxed to the CP&L's contracts administrator who had placed the job order. CX 72 at 8-9 (Cooke).

WEBB'S APPLICATIONS FOR EMPLOYMENT AT CP&L

A major problem in this complex case is to identify the positions at CP&L for which Webb was submitted from April to December, 1992. The problem is due in no small part to the fact that Webb applied for the jobs through intermediaries, vendors and friends, who communicated with CP&L's contract administration offices or supervisors, too often orally. Hence the difficulty of determining, for instance, whether Webb really authorized Quantum to submit his resume for a field engineering job and what transpired between CP&L personnel and Quantum personnel with regard to job requirements and disposition of Webb's applications. CP&L's records concerning resumes submitted in 1992 are no longer available, because they were routinely destroyed after a few months. Fortunately, Quantum did keep computer records relating to its submission of Webb's resumes for CP&L's positions.

A Quantum document containing Webb's Submittal History since November 15, 1991, indicates that Webb's resume was submitted to CP&L on three occasions, May 6, May 13, and June 15, 1992. CX 24. Michelle Cooke and Sharon George, Quantum's employees who worked with Webb, testified that this history is complete and that Webb was not submitted at any other time. CX 72 at 16, 80 (Cooke); CX 73 at 101-02 (George).

On May 6, 1992, George submitted Webb for consideration for the position of civil/structural engineer. The submission was addressed to Janet Crews with a request to forward it to Tony Groblewski. CX 22. It appears that the submittal was in response to a request for two structural engineers, dated April 22, 1992, and originated by supervisors Ken Fennel and Geoff Wertz. Compare RX 49 with CX 32. The request specifies that a degreed individual was desired for at least one of the positions. Wertz does not recall seeing Webb's application. Wertz hired an individual with a college degree in mechanical engineering and a professional engineering certification. Tr. at 784. Wertz testified that prior to this case he did not know Webb, and did not know that Webb had gone to the NRC. Tr. at 783-84. Fennel testified his position was never filled. There is no evidence that the May 6 submittal was even sent to Groblewski. Crews testified she does not recall receiving the May 6 submittal, and that, if she did, she probably threw it away because it does not have an identification number connecting it with a job request. Tr. at 981, 985, 988.

The May 13, 1992 submittal, addressed to Ray Heatherington, was unquestionably a blind submittal. CX 14; CX 30. Heatherington does not remember receiving it, and believes that probably he discarded it. Tr. at 690-91. As of May 29, 1992, Quantum had no idea of where it might have ended up. CX 31. In sum, there is no evidence the submittal was even referred to any hiring supervisor for consideration.

Webb contends that on June 15, 1992 his resume was submitted by Quantum for a field engineering position that did not require a degree, relying on a Quantum computer document identified as CX 25. This document shows that on June 8, 1992 a job order was received from Heatherington for four field engineers, a position that did not require a degree. However, an entry dated August 19, 1992, under the heading of "Status Report", indicates that two plant structural modifications engineers were needed, and a degree was required. CX 25. A related document also indicates under "Job Description and Duties" that engineering degree was required. CX 29. Returning to CX 25, I note that Webb was submitted in response to that job order on June 15, 1992, and that subsequently, six individuals were also submitted. An entry dated September 21, 1992, states that "...user is slow moving. Only will hire 1 per month & nobody ruled out on this req except former emp Chuck Webb." The next entry indicates that the order had been canceled, and that Enercom, a rival vendor, would cover the requirement. CX 25; CX 29.

The confusion created by CX 25 with regard to the nature of the position for which Webb applied through Quantum on June 15, 1992 was clarified by Michelle Cooke. Cooke testified that the job order of June 8, 1992 was received by telephone. CX 72 at 121. Initially, the order was understood to request field engineers, a position that did not require a degree. Subsequently, Quantum was advised that the need was for structural engineers with a degree, thus ruling out Webb. CX 72 at 18-21, 54, 121 (Cooke). See also CX 73 at 35-37. In fact, Webb learned from a rival vendor that the job required a degree and so advised Cooke on June 24, 1992. CX 26 (Contact Entry); CX 72 at 49.

Cooke also explained the remark quoted above, that only Webb had been ruled out. She made an inquiry about the status of Webb’s application and learned that he had been ruled out because he did not have a degree. As of the date of the inquiry she only knew that Webb had been ruled out. Later, she learned that all the submittals were ruled out, and that the job order had been canceled. CX 73 at 39, 111-13. See CX 73 at 52-54 (George).

At any rate, there is no doubt that the June 15, 1992 submittal was for a position under the supervision of J. E. Harrell. Webb knew Harrell because his last supervisor at Brunswick, Richard Tripp, reported to Harrell. Webb called Harrell to let him know of his availability for recall, and was assured there should be no problem. Tr. at 162. Harrell suggested that Webb ask Quantum to submit his resume to Harrell, and Webb did so. Ibid. Harrell was not aware at that time that Webb did not have an engineering degree. Tr. at 617. Harrell testified that he did receive Webb's resume but could not hire him because Harrell was looking for engineers with a degree. He hired five individuals who had at least a bachelor's degree. Tr. at 616-20. Harrell testified that before the commencement of this litigation he had not associated Webb with any issues raised with NRC. Tr. 611-12.

WEBB'S OTHER ATTEMPTS TO FIND WORK AT CP&L

Webb attempted to return to CP&L by utilizing the services of two other vendors, and the assistance of several colleagues. Webb went to Tech Aid to find work with Bechtel, which had been selected by CP&L to do some work at the Brunswick Plant. But he was informed that Bechtel was using its own personnel. Tr. at 171. Moreover, Susan Vann, CP&L's project manager for the Bechtel work, testified that Bechtel made its own decisions about workers to use on the project, and that CP&L did not participate in this process. Tr. 1004-06. See also CX 65A (Logan Affidavit). Webb also submitted a resume through Chuck Kestner at Pacific Nuclear for a position at the Robinson Plant, another facility of CP&L. Again he was told that these positions would not be filled with contract workers. Tr. at 171-72; CX 63A (Kestner Affidavit).

Friends working at the Brunswick Plant also contacted supervisors to let them know that Webb was seeking employment. George L. Frick was one of them. Frick also tried to find out from Mr. Tripp if there was any reason Webb was not being rehired. Frick happened to see Tripp by the bathroom, and asked him if he had any problem with regard to Webb. Tripp replied "yes", that Webb's productivity had been very low on the night shift and had some communication problem. Frick called Webb on the phone, and related his conversation with Tripp. RX 71 (Frick Depo.) at 8-10. Frick testified that he has known Tripp for quite a few years and that Tripp is an honest person. "If you ask him the question, he will give you the answer." CX 71 at 9.

Tripp confirmed the conversation, although he remembers it as taking place in the parking lot, in October or November 1992. Tr.

at 842. Tripp added that he had worked with Frick a number of years and just gave him his opinion as to why Webb had not been re-hired. Tripp was not in the position to hire Webb for any job, and had never been asked for an opinion on whether Webb was eligible to be re-hired. Tr. at 843-44. Tripp testified that he learned about Webb's contacts with NRC after the complaint herein was filed. Tr. 845-46. According to Webb's journal, he learned of Tripp's comment on November 1, 1992. CX 28 at 49.

THE ISSUES

Webb's complaint is that CP&L "discriminated against him by not bringing him back to the Brunswick nuclear plant site as a design engineer or as a field engineer. Mr. Webb also claims that he was discriminated against as a result of 'bad mouthing' by his former supervisor, Richard Tripp." Complainant's Post-hearing Brief at 1.

CP&L's answer is that: 1) the personnel involved in making hiring decisions did not know, and had no reason to suspect, that Webb had contacted NRC; 2) there is no causal connection between Webb's protected activity and his failure to be re-employed at the Brunswick Plant; 3) Richard Tripp's comment on Webb's work performance is not an act of discrimination; and, in any event, 4) Webb's complaint is untimely. CP&L's Post-hearing Brief at 25, 29, 34.

In reply, Webb contends that CP&L knew of Webb's allegations to NRC because: 1) the company was able to "fingerprint" Webb as the source of certain issues raised by NRC; 2) conflicts in the testimony of CP&L's witnesses with regard to Webb's job qualifications constitute circumstantial evidence of knowledge of his reports to NRC; and 3) the abrupt change in CP&L's pattern of re-employing Webb during outages, following immediately his contacts with NRC constitutes circumstantial evidence of such knowledge. Complainant's Post-hearing Brief at 2.

THE APPLICABLE LAW

Section 211 of the ERA provides that no employer may discharge or otherwise discriminate against any employee with respect to employment because the employee has commenced or participated in a proceeding under the Act, or participated in any other action to carry out the purposes of the Act. 42 U.S.C. §5851(a). In this case, it is not disputed that CP&L and Webb are employer and employee, respectively, within the meaning of the

ERA, and that Webb's contacts with NRC are activities protected by the Act. The legal framework within which the parties must litigate a case of retaliation under the ERA is well established. The complainant must carry an initial burden of establishing a prima facie case of discrimination under the Act. This may be done by showing that : (1) the complainant engaged in protected conduct: (2) the employer was aware of that conduct; and (3) the employer took adverse action against him. Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 9, aff'd, ___ F.3d ___, Case No. 95-1729 (8th Cir. March 5, 1996). The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Ibid. The respondent may rebut the prima facie case by adducing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The complainant may then counter respondent's evidence by proving that the reason proffered by the respondent is a pretext. Carroll at 10. In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of law. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

In Carroll, the Secretary held that a complainant must make a prima facie case in order to withstand a motion for judgment as a matter of law at the conclusion of his case. Once the respondent has presented rebuttal evidence, the only remaining question in the case is whether the complainant has proved by a preponderance of the evidence that respondent has discriminated against him in retaliation for his protected activity. Carroll, at 11-12. This notwithstanding, it seems to me that setting out the elements of a prima facie case is a useful guide to the analysis of the case, in that they indicate the elements of the cause of action that the complainant must prove. See Zinn v. University of Missouri, Case No. 93-ERA-34 & 36, Sec. Dec., Jan. 18, 1996.

Of more pertinence to this case, the Secretary has held that in determining whether a complainant has established adverse action in a failure to hire him, the framework of a prima facie case outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) applies. In order to establish a prima facie case of discriminatory refusal to hire, the complainant must show: (1) that he applied and was qualified for a job for which the employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and that the employer continued to seek applicants from persons of complainant's qualifications. Samodurov v. General Physics Corp., Case No. 89-ERA-20, Sec. Dec., Nov. 16, 1993, slip op. at 9-10.

From the above precedents I derive the following rules of law to apply to this case. In order to prove his case with respect to refusals to rehire, Webb must first identify the adverse actions taken by CP&L, in accordance with the standard articulated in McDonald Douglas, and then establish that CP&L's personnel who were in a position to hire him (1) either knew or suspected that he had reported safety concerns to the NRC, and (2) such knowledge or suspicion was a contributing factor in the adverse actions. As for the part of the complaint predicated on adverse comments by Richard Tripp, the rule announced in Gaballa v. The Atlantic Group, Inc., Case No. 94-ERA-9, Sec. Dec., Jan. 18, 1996, will apply.

The law applicable to the issue of timeliness will be set forth in the section of this opinion dealing with that issue.

DISCUSSION

1. Preliminary Observations.

Webb asserts that the central inquiry in this case is whether "CP&L retaliated against complainant Charles Webb because Mr. Webb raised safety complaints," and that the "central issue is whether CP&L's explanation for not hiring Mr. Webb is a pretext". Complainant's Post-Hearing Brief at 57. I overlook the fact that Complainant misapprehends the holding in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), and wish to note that this focusing on "CP&L" as the single actor that committed acts of discrimination against Webb is a distraction from the task of determining what adverse employment decisions were made and what motivated them. Even though under Carroll this proceeding is past the stage where the issue of a prima facie case is relevant, I believe that it is part of Complainant's case to identify the particular employment actions or omissions that are alleged to be in retaliation for his going to NRC. Since Webb claims reinstatement and back pay, he must identify the particular positions he would have obtained in the absence of unlawful discrimination, at least for the purpose of fashioning the remedy he seeks. See Blackburn v. Martin, 982 F.2d 125, 129 (4th Cir. 1992).

In keeping with this view of the case, I find it irrelevant that CP&L employed technical personnel without an engineering degree, in the absence of a showing, at least, that Webb applied and was qualified for those positions, and yet was denied employment. Similarly, it is irrelevant that CP&L could have

fingerprinted Webb as the NRC alleger; different opinions of Webb's work performance, entertained by different supervisors, are not a self-contradiction; and misunderstandings and ambiguities on the part of Quantum personnel, that acted as agents of Webb, cannot support a charge of discrimination against CP&L.

2. Acts of Retaliation for Protected Activities.

The record shows that Harrell considered and rejected Webb's application for employment; that Wertz may have done the same; and that Tripp expressed an unfavorable comment on Webb's work performance. In order to prove that these actions are unlawful under the ERA, Webb must establish that these three supervisors of CP&L knew, or suspected, that he had made allegations to NRC and that this knowledge or suspicion contributed to, or influenced, their actions. I think Webb has failed on both counts.

Webb makes three principal arguments in support of his contention that CP&L knew of his allegations to NRC: 1) CP&L could have fingerprinted him; 2) the radical change in CP&L's pattern of routinely employing him during every outage is circumstantial evidence of retaliation; and 3) the time proximity between CP&L's changed attitude toward Webb and his allegations to NRC raises an inference of retaliation.

Fingerprinting is a concept suggested to Webb by Jack Taylor, a Special Agent of NRC. Taylor explained that if a person brings a specific allegation of technical weakness to the attention of a licensee; and that person is the only person bringing that particular concern to the licensee's attention; and if that person then reports that concern to the NRC and is the only person to do so; and if the NRC conducts an inspection of that particular area and brings up that particular concern to the management; that is known as fingerprinting. CX 38 at 43-44. Obviously, fingerprinting would be easier if a person puts in circulation a series of allegations that only that person knows.

If this formula is taken literally, nobody could have fingerprinted Webb since, by his admission, he was not particularly associated with any of the issues he raised to NRC. Tr. at 317-20. But, granting for the sake of the argument that Webb could have been identified that way, I note that there is no evidence that anyone did perform the work of identification. Webb does not say that Wertz, Harrell, and Tripp each undertook an investigation to trace the source of half a dozen safety issues,

out of hundreds raised at the time of the 1992 shutdown, and that all three came to the same conclusion; or whether only one of them did the work of identification and divulged the results to the others; or whether a stranger to this record did it, and then passed the word around. Nor is there a suggestion as to the time when the identity of the alleger was discovered. I note that the specifications for the position that Wertz filled were set by April 22, 1992, and that the first letter of the NRC that brought one allegation to the attention of CP&L's management is dated May 5, 1992. I do not find the fingerprinting argument persuasive.

The "proximity-in-time" argument cannot supply the want of evidence of knowledge. The familiar rule is that when an adverse action follows within a reasonable time the employer's awareness of protected conduct (the second element of the standard prima facie case), an inference arises of discriminatory motive. See Carroll, slip op. at 14-15. "Generally, the proximity in time between the decisionmaker's awareness of Complainant's protected activity and the adverse employment action is sufficient to raise an inference of causation". Carson v. Tyler Pipe Co., Case No. 93-WPC-11, Sec. Dec., March 24, 1995, slip op. at 9. In Hobby v. Georgia Power Co., Case No. 90-ERA-30, Sec. Dec., Aug. 4, 1995, on which Webb relies, knowledge of protected activity was established independently. Hobby, slip op. at 23-24. In sum, the proximity rule supports only one inference, that knowledge of protected activity influenced adverse action that followed. The rule does not support a double inference of knowledge and discriminatory motive. Compare Lederhaus v. Paschan, Case No.91-ERA-13. Sec. Dec., Oct. 26, 1992, slip op. at 3-7.

Finally, the argument based on the break in CP&L's hiring pattern presupposes, erroneously, that CP&L had a duty to find a position for Webb. Only Harrell and possibly Wertz were in a position to consider, and act on, Webb's applications. No hiring pattern of these individuals with respect to Webb is established. The record does show that Webb's employment pattern was broken, but Webb's failure to find engineering work after November 15, 1991 cannot be attributed to blacklisting by CP&L.

Beginning in January 1992, Webb conducted a comprehensive search for work in and out of the nuclear industry and all over the country. In that January alone, Webb sent out 1400 resumes for work in the nuclear industry and other industries, and by the time NRC first wrote to CP&L had received no job offer. Webb feels that his failure to obtain a favorable response at least in the nuclear industry was due to blacklisting on the part of CP&L. Tr. at 264-66. Also, Webb's journal shows that during the period from May to November 1992, Webb was submitting his resumes to friends and job shops in a number of States, to no avail. See CX

28 at 11 (resumes sent June 5, 1992 to 8 recruiting services in different States), 51 (calls to several job sources). There is no evidence that anyone at CP&L interfered with these efforts. Finally, by the time of the hearing, Webb had been unable to secure an engineering job. The failure to find employment despite such a persistent and widespread search rather supports CP&L's explanation, that after the cessation of construction activity in the nuclear industry more degreed engineers became available, who placed Webb at a disadvantage in the competition for employment.

I conclude that Webb has failed to establish that either Wertz, or Harrell, or Tripp had knowledge of Webb's allegations to the NRC, and , inferentially, that they lied under oath. Furthermore, the contention that the explanations given by Wertz and Harrell for their selection of applicants with an engineering degree are pretextual is not convincing. Wertz expressed his desire for a degreed engineer before Webb contacted the NRC. As for Harrell's need for an engineer with a degree, Webb learned of it from another vendor within two weeks of the submission of his resume on June 15, 1992, and before Harrell made his selections. Moreover, it is not credible that Harrell would have hired five individuals with a degree, just to cover up his intent to discriminate against Webb. Thus, I also conclude that these two rejections were not acts of discrimination in violation of the ERA.

Finally, I cannot agree with Webb that Trip's response to Frick's question was a discriminatory reference within the meaning of Gaballa v. The Atlantic Group, Inc., Case No. 94-ERA-9, Sec. Dec., Jan. 18, 1996. Gaballa held that the employer " unlawfully discriminated against Gaballa when, in providing information concerning his employment to an outside party (a reference checking company), Pettus referred to Gaballa's complaint about discrimination. Discriminatory referencing violates the ERA regardless of the recipient of the information." Id., slip op. at 3. The rationale for the ruling is that the risk of improper information being provided to prospective employers requires a prophylactic rule prohibiting "improper references to an employee's protected activity" regardless of whether loss of employment opportunities results. Ibid.

I believe that Tripp's comment on Webb's productivity and communication problem does not come within the Gaballa holding because the comment makes no reference to any discrimination or protected activity. In addition, Tripp's unfavorable comment, or, for that matter, intention not to rehire Webb, is not an adverse employment action within the meaning of McDonald Douglas Corp. v.

Green, supra, , because he was not hiring. Therefore, Tripp's response to Frick's question is not a violation of the ERA.

3. Timeliness of Complaint.

Section 211 (b)(1) of the ERA provides that any employee who "believes that he has been discharged or otherwise discriminated against by any person" in violation of the Act may file a complaint within 180 days after such violation occurred. Webb filed his complaint on April 7, 1993. CX 1, 2. CP&L contends that the complaint is untimely on the ground that Webb knew by September 21, 1992, at the latest, that he was not qualified for the jobs for which he had been submitted and had not been selected. Webb does not address the issue of timeliness in his post-hearing brief, but it is clear from his response to CP&L's motion for summary decision that he relies on the continuing violation doctrine.

In the Decision and Remand Order of July 17, 1995, the Secretary held that the timeliness of an ERA complaint may be preserved under the continuing violation theory where there is an allegation of a course of related discriminatory conduct and the charge is filed within 180 days of the last discriminatory act, citing Thomas v. Arizona Pubic Service Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993. For guidance in determining whether alleged discriminatory acts are sufficiently related to constitute a course of discriminatory conduct, Thomas lists three factors to be considered: (1) whether the alleged acts involve the same subject matter; (2) whether the alleged acts are recurring or more in the nature of isolated decisions; and(3) the degree of permanence. Thomas, slip op. at 13.

Michelle Cooke had learned by September 21, 1992, that Webb had not been hired. On that date, Cooke had a telephone conversation with Webb concerning the status of his submissions to CP&L, and in the course of this conversation Webb stated his belief that he was being blackballed, and threatened to sue CP&l and call her as a witness. CX 72 at 72-73, 111-14; CX 26 (Quantum Contact Entry). I think that by September 21, 1992, Webb knew that his applications for positions at CP&L had been rejected. At least, he believed he had been discriminated against.

Webb apparently contends that his complaint is timely because (1) at least one act of unlawful blacklisting, Tripp's answer to Frick's question, occurred within the limitations period, and (2) he has not yet received notice of CP&L's decision on his applications for field engineering positions. I think that

neither contention has the force to resurrect any claim he might have with regard to the rejection of the May 6 and June 15, 1992 applications. Although the Tripp incident did occur within 180 days of the filing of the complaint, it cannot pull the rejection claims inside the limitations period because, in my view, it was not an act of unlawful blacklisting. In addition, the rejections of the two applications are not related in subject matter to Tripp's comment, and were isolated employment decisions of a permanent nature that should have triggered Webb's awareness of, and duty to, assert his rights. See Holden v. Gulf States Utilities, Case No. 92-ERA-44, Sec. Dec., April 14, 1995, slip op. at 13. A consummated act, such as discharge or refusal to hire, may not be treated as merely an episode of a continuing violation. See English v. Whitfield, 858 F.2d 957, 962 (4th Cir. 1988). Finally, Webb's failure to hear about the outcome of his applications for field engineering positions only adds support to the finding that no such applications were made by Quantum.

CONCLUSION

By reason of the foregoing, I conclude that Webb has failed to prove that CP&L has discriminated against him in violation of the ERA. In addition, I conclude that the claims regarding the rejection of the May 6 and June 15, 1992 applications are not timely. In view of these conclusions, it is not necessary to address the remaining issues.

RECOMMENDED ORDER

The complaint of Charles A. Webb filed under Section 211 of the Energy Reorganization Act of 1974, as amended, is dismissed.

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Nicodemo De Gregorio
Administrative Law Judge